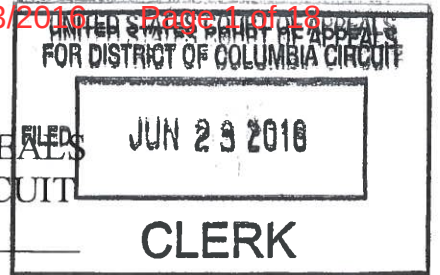


JUN 23 2016

RECEIVED

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT



No. 16-1203

CALIFORNIA COMMERCE CLUB, INC.,

*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

ORIGINAL

**PETITION FOR REVIEW**

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, Petitioner California Commerce Club, Inc. d/b/a Commerce Hotel and Casino hereby petitions this court for review of the Decision and Order of the National Labor Relations Board in NLRB Case Number 21-CA-149699, captioned California Commerce Club, Inc. and William J. Sauk, reported at 364 NLRB No. 31, and entered on June 16, 2016, and prays that said Decision and Order be denied enforcement, set aside, modified and/or remanded for further proceedings. The Board's June 16, 2016 Decision and Order is attached hereto as Exhibit "1."

Dated: June 23, 2016

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By



David Gallacher, Bar No. 49040

Sheppard, Mullin, Richter &  
Hampton, LLP

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Counsel for Petitioner California Commerce  
Club, Inc. d/b/a Commerce Hotel and Casino

**CERTIFICATE OF SERVICE**

I hereby certify that on June 23, 2016, I caused a true and accurate copy of the foregoing **PETITION FOR REVIEW** to be served via first class U.S. mail, postage prepaid on the following person(s):

National Labor Relations Board  
Region 21  
888 South Figueroa St., 9<sup>th</sup> Floor  
Los Angeles, CA 90017-5449  
Tel No.: (213) 894-5204  
Fax No.: (213) 894-2778  
Email: NLRBRegion21@nlrb.gov; Lindsay.Parker@nlrb.gov

William J. Sauk  
20954 White Rock Drive  
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Email: kipsauk62@gmail.com

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By



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Counsel for Petitioner California Commerce  
Club, Inc. d/b/a Commerce Hotel and Casino

# Exhibit 1

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

California Commerce Club, Inc. and William J. Sauk.  
Case 21-CA-149699

June 16, 2016

### DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA,  
AND HIROZAWA

On January 6, 2016, Administrative Law Judge Amita Baman Tracy issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The judge found, applying the Board's decision in *D. R. Horton*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), that the Respondent violated Section 8(a)(1) of the Act by maintaining an Arbitration Agreement and Mandatory Dispute Resolution Process (the Agreement) that requires employees, as a condition of employment and continued employment since about February 2015, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.<sup>1</sup> The judge also found that the Respondent independently violated Section 8(a)(1) by requiring employees to keep arbitration proceedings confidential and prohibiting disclosure of any "evidence or award/decision beyond the arbitration proceeding."

The Board has considered the decision and the record in light of the exceptions and briefs and, based on the judge's application of *D. R. Horton* and *Murphy Oil*, we affirm the judge's rulings, findings,<sup>2</sup> and conclusions and

<sup>1</sup> See also *Lewis v. Epic Systems*, \_\_\_ F.3d \_\_\_ (7th Cir. May 26, 2016) (holding mandatory individual arbitration agreement that did not permit collective action in any forum violates the Act and is also unenforceable under the Federal Arbitration Act, 9 U.S.C. §§1, et seq.).

<sup>2</sup> On exceptions, the Respondent argues that *D. R. Horton* and *Murphy Oil* were wrongly decided and should be overruled. We disagree and adhere to the findings and rationale in those cases. The Respondent also argues that the Agreement's confidentiality provision is lawful. We agree with the judge that the confidentiality provision of the Agreement independently violates Section 8(a)(1). A workplace rule that prohibits the discussion of terms and conditions of employment, as the Respondent's confidentiality provision does by prohibiting employees from "disclosure of evidence or award/decision beyond the arbitration proceeding," is unlawfully overbroad. See, e.g., *Century Fast*

adopt the recommended Order as modified and set forth in full below.<sup>3</sup>

### ORDER

The National Labor Relations Board orders that the Respondent, California Commerce Club, Inc., Commerce, California, its officers, agents, successors, and assigns, shall

#### 1. Cease and desist from

(a) Maintaining an Arbitration Agreement and Mandatory Dispute Resolution Process that requires employees, as a condition of employment, to waive the right to maintain employment-related class or collective actions in all forums, whether arbitral or judicial.

(b) Maintaining an Arbitration Agreement and Mandatory Dispute Resolution Process that requires employ-

*Foods*, 363 NLRB No. 197, slip op. at 1-2 fn. 4 (2016); *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. at 3 (2016).

The Respondent also asserts that the complaint should be dismissed because Charging Party Sauk was no longer employed by the Respondent when the complaint issued and because Sauk did not engage in protected concerted activity. However, while the Respondent filed exceptions pertaining to these arguments, the Respondent failed to brief the issues. Accordingly, the Respondent presented these assertions as bare exceptions without any supporting argument and, under Sec. 102.46(b)(2) of the Board's Rules & Regulations, such unsupported exceptions may be disregarded. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enf. 456 F.3d 265 (1st Cir. 2006). In any event, the exceptions lack merit. Neither Sauk's employment status nor the protected nature of his conduct are relevant to the ultimate issue of whether the Respondent's maintenance of the Agreement violates Sec. 8(a)(1).

Our dissenting colleague, relying on his dissenting position in *Murphy Oil*, 361 NLRB No. 72, slip op. at 22-35 (2015), would find that the Respondent's Agreement does not violate Sec. 8(a)(1). He observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, above, slip op. at 2, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 & fn. 2 (2015). But what our colleague ignores is that the Act "does create a right to pursue joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil*, above, slip op. at 2 (emphasis in original). The Respondent's Agreement is just such an unlawful restraint. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 4, 8-9 & fns. 28, 29, 31 (2015).

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague's view that finding the Agreement unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, above, slip op. at 18; *Bristol Farms*, above, slip op. at 3. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, above, slip op. at 17-18; *Bristol Farms*, above, slip op. at 2.

<sup>3</sup> We shall modify the judge's recommended Order to conform to the Board's standard remedial language for the violations found, and we shall substitute a new notice to conform to the Order as modified.

ees to keep confidential any arbitration proceedings undertaken as the result of such agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the Arbitration Agreement and Mandatory Dispute Resolution Process in all of its forms, or revise it in all of its forms to make clear to employees that the Arbitration Agreement and Mandatory Dispute Resolution Process does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not require employees to keep confidential any arbitration proceedings undertaken as a result of such agreement.

(b) Notify all current and former employees employed since February 2015, who were required to sign or otherwise become bound to the unlawful Arbitration Agreement and Mandatory Dispute Resolution Process in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days after service by the Region, post at its Commerce, California facility copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 2015.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the

Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 16, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, my colleagues find that the Respondent's Arbitration Agreement and Mandatory Dispute Resolution Process violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Agreement waives the right to participate in class or collective actions regarding non-NLRA employment claims. I respectfully dissent from this finding for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*<sup>1</sup>

I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.<sup>2</sup> However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "ad-

<sup>1</sup> 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was recently denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

<sup>2</sup> I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, above, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. Id.; see also *Beyoglu*, 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting).

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

CALIFORNIA COMMERCE CLUB, INC.

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just” grievances “at any time.”<sup>3</sup> This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee’s right to “refrain from” exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;<sup>4</sup> (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board’s position regarding class waiver agreements;<sup>5</sup> and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitra-

tion Act (FAA).<sup>6</sup> Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.<sup>7</sup>

Accordingly, as to these issues,<sup>8</sup> I respectfully dissent.

Dated, Washington, D.C. June 16, 2016

Philip A. Miscimarra,

Member

#### NATIONAL LABOR RELATIONS BOARD

<sup>3</sup> *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: “Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment” (emphasis added). The Act’s legislative history shows that Congress intended to preserve every individual employee’s right to “adjust” any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

<sup>4</sup> When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) (“The use of class action procedures is not a substantive right.”) (citations omitted), petition for rehearing en banc denied No. 12-60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) (“[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.”).

<sup>5</sup> The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil, Inc., USA v. NLRB*, above; *D. R. Horton, Inc. v. NLRB*, above. The overwhelming majority of courts considering the Board’s position have likewise rejected it. See *Murphy Oil*, above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co., Inc.*, 96 F. Supp. 3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.*, 99 F. Supp. 3d 1072 (N.D. Cal. 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services, Inc.*, No. 1:12-cv-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA); *Bell v. Ryan Transportation Service, Inc.*, No. 15-9857-JWL, 2016 WL 1298083 (D. Kan. Mar. 31, 2016); but see *Lewis v. Epic Systems Corp.*, No. 15-2997, 2016 WL 3029464 (7th Cir. May 26, 2016); *Totten v. Kellogg Brown & Root, LLC*, No. ED CV 14-1766 DMG (DTBx), 2016 WL 316019 (C.D. Cal. Jan. 22, 2016).

<sup>6</sup> For the reasons expressed in my *Murphy Oil* partial dissent, and those thoroughly explained in former Member Johnson’s dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil*, above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

<sup>7</sup> Because I disagree with the Board’s decisions in *Murphy Oil*, above, and *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in part, 737 F.3d 344, 362 (5th Cir. 2013), and I believe the NLRA does not render unlawful arbitration agreements that provide for the waiver of class-type litigation of non-NLRA claims, I find it unnecessary to reach whether such agreements should independently be deemed lawful to the extent they “leave[] open a judicial forum for class and collective claims,” *D. R. Horton*, above at 2288, by permitting the filing of complaints with administrative agencies that, in turn, may file class or collective action lawsuits. See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

<sup>8</sup> I concur with my colleagues’ finding that the Agreement unlawfully interferes with protected concerted activity in violation of Section 8(a)(1) based on its requirement that, “the arbitration shall be conducted on a *confidential* basis and there shall be no disclosure of evidence or award/decision beyond the arbitration proceeding.” (emphasis added). Here, I rely on the fact that a central aspect of protected concerted activity under the NLRA involves discussions and coordination between or among two or more employees regarding employment-related disputes, including those that may be resolved in arbitration, see fn. 2, above; such discussions and coordination would appear to be precluded by “confidential” arbitration; and the record reveals no reasonable limitations on or justifications for a blanket requirement of confidentiality. Cf. *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 13–19 (2015) (Member Miscimarra, dissenting in part) (describing requirement that the Board strike a proper balance between asserted business justifications and potential impact on NLRA rights).

I further concur with my colleagues’ finding to disregard the Respondent’s bare exceptions. In my view, bare exceptions that lack any explanation or support either in the exception or the supporting brief should be disregarded, absent unusual circumstances. Here, the Respondent has not pointed to any unusual circumstances, and my review of the record discloses none. Accordingly, I agree with my colleagues that it is appropriate to disregard the Respondent’s bare exceptions. In doing so, I do not reach the merits of the bare exceptions.

## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT maintain an Arbitration Agreement and Mandatory Dispute Resolution Process that requires our employees, as a condition of employment, to waive the right to maintain employment-related class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT maintain an Arbitration Agreement and Mandatory Dispute Resolution Process that requires employees to keep confidential any arbitration proceedings undertaken as a result of such agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the Arbitration Agreement and Mandatory Dispute Resolution Process in all of its forms, or revise it in all of its forms to make clear that the agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not require employees to keep confidential any arbitration proceedings undertaken as a result of such agreement.

WE WILL notify all current and former employees employed since February 2015, who were required to sign or otherwise become bound to the unlawful Arbitration Agreement and Mandatory Dispute Resolution Process in any form that it has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

## CALIFORNIA COMMERCE CLUB, INC.

The Board's decision can be found at [www.nlr.gov/case/21-CA-149699](http://www.nlr.gov/case/21-CA-149699) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor

Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



*Lindsay R. Parker, Esq.*, for the General Counsel.  
*Jason Kearnaghan, Esq.*, for the Respondent.

## DECISION

## STATEMENT OF THE CASE

AMITA BAMAN TRACY, Administrative Law Judge. This case is before me on the parties' October 15, 2015 motion to submit case on stipulation and stipulation of facts (hereinafter, Joint Motion), which I approved on October 23, 2015.<sup>1</sup> William J. Sauk (Sauk or Charging Party) filed the charge and amended charge in Case 21-CA-149699 on April 7, 2015, and June 16, 2015, respectively. The General Counsel issued the complaint (the complaint) on July 29, 2015.

The complaint alleges that California Commerce Club, Inc. (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by implementing and maintaining an Arbitration Agreement and Mandatory Dispute Resolution Process (the Agreement) requiring its employees, as a condition of employment, since about February 2015 to resolve employment-related disputes exclusively through individual arbitration and to relinquish any rights they have to disputes through collective or class action. Furthermore, Respondent required its employees to comply with the Agreement as a condition of continued employment and to execute a paper acknowledging receipt of the Agreement. The complaint also alleges that Respondent violated Section 8(a)(1) of the Act by requiring arbitration proceedings to be confidential and prohibiting disclosure of "any evidence or award/decision beyond the arbitration proceeding" thereby interfering with employees' ability to discuss topics protected by Section 7 of the Act.

Respondent filed a timely answer on August 11, 2015.

For the reasons that follow, I find that Respondent violated Section 8(a)(1) of the Act when it implemented and maintained the Agreement, and when it required arbitration proceedings to remain confidential.

On the joint motion which consists of the stipulated facts and exhibits, and after considering the briefs filed by the General Counsel and Respondent, I make the following<sup>2</sup>

<sup>1</sup> Abbreviations used in this decision are as follows: "Jt. Mt." for Joint Motion; "Exh." for exhibit; "GC Br." for General Counsel's brief; and "R. Br." for Respondent's brief.

<sup>2</sup> Although I have included several citations to the record to highlight particular stipulations or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based on my review and consideration of the entire record.

## CALIFORNIA COMMERCE CLUB, INC.

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## FINDINGS OF FACT

## I. JURISDICTION

Respondent, a California corporation, operates a hotel and California card casino at its facility in Commerce, California, where it annually derived gross revenues in excess of \$500,000 and purchased and received at its facility in Commerce, California goods valued in excess of \$50,000 from other enterprises within the State of California which had received those goods directly from outside the State of California. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

## A. Arbitration and Confidentiality Provision

Since February 2015, Respondent implemented and maintains the Agreement.<sup>3</sup> The Agreement, a 2 page document, states in pertinent part:

In consideration for California Commerce Club, Inc. (hereinafter the "Company") employing you or continuing to employ you, and the mutual promises set forth herein, you and the Company, and its representatives, successors and assigns (collectively referred to as "The Parties"), agree to the following:

[. .]

In the event of any dispute, prior to commencing legal action, I or the Company, whichever is the complaining party, shall give prompt written notice to the other (as to the Company, this person shall be the Executive Director of Human Resources) of the nature of the dispute, claim or controversy. Upon the receipt of such written notice, the Parties agree to meet within 30 days in person to discuss in good faith the dispute, claim or controversy for the purpose of attempting to resolve it informally.

If the Parties cannot resolve their differences in that informal dispute resolution process, then all claims relating to my recruitment, employment with, or termination of employment from the Company shall be deemed waived unless submitted to final and binding arbitration by JAMS, subject to the following requirements:

[. .]

The arbitration shall be conducted on a confidential basis and there shall be no disclosure of evidence or award/decision beyond the arbitration proceeding.

<sup>3</sup> The General Counsel has no evidence as of the date of the joint motion that Respondent has enforced the Agreement, or any provision within, to restrict the exercise of employees' Sec. 7 rights (Jt. Mt. at 4(10)). Nor does the General Counsel have any evidence that Respondent has ever attempted to use the Agreement to compel arbitration of a charge filed with the National Labor Relations Board, nor used the Agreement to discourage employees from filing such charges, or any charge filed with an administrative agency (Jt. Mt. at 5(11) and (12)).

[. .]

- The arbitrator shall have the authority to award all potential damages that may be awarded in court and the decision and award of the arbitrator shall be final, binding, and enforceable in the courts.
- **Class Action Waiver:** All claims must be brought in the employee's individual capacity, and not as a plaintiff or participating class member in any purported class, collective, consolidated or representative proceeding, and must be brought in within the time frame provided by the applicable statute of limitations for such claim.
- The Arbitrator shall not have the authority to hear or issue an award on any claim brought on a class, collective, consolidated or representative basis.

In the event that either party files, and is allowed by the courts to prosecute, a court action on any claim covered by this agreement, the parties agree that they each agree not to request, and hereby waives his/her/its right to a trial by jury.

This pre-dispute resolution agreement covers all matters directly or indirectly related to my recruitment, employment, or termination of employment by the Company [. .]

(emphasis in original) (Jt. Mt. at Exh. 5.)

Furthermore, the Agreement applies to various claims, including the Fair Labor Standards Act (FLSA), but sets forth the following where it does not apply:

This Agreement does not apply to any Claims by the employee: (a) for state Workers' Compensation benefits; (b) for unemployment insurance benefits filed with the appropriate government entity; (c) arising under the National Labor Relations Act and filed through a charge with the National Labor Relations Board; or (d) which are otherwise expressly prohibited by law from being subject to arbitration under this Agreement. This Agreement does not preclude filing an administrative charge or complaint with the appropriate government entity if such filing is protected or required by law.

(Jt. Mt. at Exh. 5.)

The Agreement concludes with the following, along with the employee's signature and the signature of Jose Garcia, executive director of Respondent's human resources:

YOU MAY WISH TO CONSULT WITH AN ATTORNEY PRIOR TO SIGNING THIS AGREEMENT. IF SO, TAKE A COPY OF THIS FORM WITH YOU. HOWEVER, YOU WILL NOT BE OFFERED EMPLOYMENT UNTIL THIS FORM IS SIGNED AND RETURNED BY YOU.

PLEASE READ THESE PROVISIONS CAREFULLY, BY SIGNING BELOW, YOU ARE ATTESTING THAT YOU HAVE READ AND UNDERSTOOD THIS DOCUMENT AND ARE KNOWINGLY AND VOLUNTARILY AGREEING TO ITS TERMS, INCLUDING YOUR WAIVER OF A RIGHT TO HAVE THIS MATTER LITIGATED IN A COURT OR JURY TRIAL, OR TO HAVE THIS MATTER RESOLVED ON A CLASS,

COLLECTIVE, CONSOLIDATED OR  
REPRESENTATIVE BASIS.

(emphasis in original) (Jt. Mt. at Exh. 5.)

Since February 2015, as a condition of employment, Respondent required its employees to comply with and agree to be bound by the Agreement by signing acknowledging receipt of the Agreement. Since February 2015, through the date of the stipulated record, Respondent has not terminated or otherwise disciplined employees for refusing to sign the Agreement.

Along with the Agreement, Respondent provided the employees with a memorandum which described the Agreement. The memorandum, dated February-March 2015, addressed to all Respondent's employees from the human resources department states, in pertinent part:

Commerce Casino's updated Arbitration Agreement and Mandatory Dispute Resolution Process is attached for your review and signature. Please be advised that your signed acknowledgment attesting that you have read and understood this document and are knowingly agreeing to its terms is required for Commerce Casino to continue to employ you.

[. .]

You are free to take the agreement home, and as stated in the document, you may wish to consult an attorney prior to signing the agreement. You have until 4/15/15 to consider this document. Failure to sign and return this document to the Human Resources department by 4/15/15 will result in termination of your employment with Commerce Casino.

(Jt. Mt. at Exh. 6.)

Contained with Respondent's Agreement is a confidentiality provision. Specifically, the Agreement states, "The arbitration shall be conducted on a confidential basis and there shall be no disclosure of evidence or award/decision beyond the arbitration proceeding." Respondent drafted the confidentiality provision contained in the Agreement "to save resources and reputation costs by arbitrating disputes outside of the public purview, and not in response to union activity" (Jt. Mt. at 4(9)).<sup>4</sup>

*B. The Charging Party's Employment with Respondent*

In February 2015, Respondent presented Sauk with the Agreement. Sauk refused to sign the Agreement. Respondent did not discipline or terminate Sauk for failing to sign the Agreement. On May 8, 2015, Sauk voluntarily resigned from Respondent.

<sup>4</sup> The General Counsel has no evidence that the confidentiality provision in the Agreement was promulgated in response to union activity (Jt. Mt. at 4(9)). The General Counsel stipulated that it is not pursuing this complaint on the grounds that any of the provisions contained in the Agreement or the Agreement alone was promulgated by Respondent in response to union activity or that the Agreement and its provisions have been enforced by Respondent to restrict Sec. 7 rights (Jt. Mt. at 5(13)).

III. ANALYSIS

In the Joint Motion, the parties agreed to the following issues:

(1) Whether Respondent's maintenance of the Agreement violates Section 8(a)(1) of the Act;

(2) Whether employees would reasonably conclude that the confidentiality provision of the Agreement precludes employees from engaging in conduct protected by Section 7 of the Act.

*A. Respondent's Agreement Violates Section 8(a)(1) of the Act.*

The complaint alleges, at paragraphs 4(a) and (b) and 5, that since February 2015, Respondent has required employees, as a condition of employment, to be bound by the Agreement which requires individual arbitration proceedings and relinquishes any rights to resolve disputes through collective or class action thereby violating Section 8(a)(1) of the Act. The parties stipulated that Respondent required the employees to comply with, agree to be bound by, and sign the Agreement as a condition of continued employment. I find that Respondent imposed a mandatory rule, and as such the Agreement should be evaluated in the same manner as any workplace rule. See *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enfd. denied in relevant part 737 F.3d 344 (5th Cir. 2013), petition for rehearing en banc denied (5th Cir. No. 12-60031, April 16, 2014); *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enfd. denied in relevant part No. 14-60800, 2015 WL 6457613, \_\_ F.3d \_\_ (5th Cir. Oct. 26, 2015).

Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Board has consistently held that collective legal action involving wages, hours, and/or working conditions is protected concerted activity under Section 7. See, e.g., *Spandisco Oil & Royalty Co.*, 42 NLRB 942, 949-950 (1942); *United Parcel Service*, 252 NLRB 1015, 1018, 1022 fn. 26 (1980), enfd. 677 F.2d 421 (6th Cir. 1982); *D. R. Horton*, supra, slip op. at 2.

In *Murphy Oil USA*, the Board reaffirmed its ruling in *D. R. Horton*, in which it held that mandatory arbitration agreements which preclude the filing of joint, class, or collective claims addressing wages, hours, or other working conditions in any forum, arbitral or judicial, is protected concerted activity and unlawfully restrict employees' Section 7 rights, thus violating Section 8(a)(1) of the Act.

Furthermore, the Board held that Section 8(a)(1) of the Act is violated when an employer requires its employees to agree to resolve all employment-related claims through individual arbitration. Mandatory arbitration agreements which bar employees from bringing joint, class, or collective actions regarding the workplace in any forum restrict employees' substantive right established by Section 7 of the Act to improve their working conditions through administrative and judicial litigation. *Countrywide Financial Corp.*, supra, slip op. at 4 (Board made

## CALIFORNIA COMMERCE CLUB, INC.

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clear in *D. R. Horton*, supra, slip op. at 12, that employers are “free to insist” that employees arbitrate their employment claims and to require that the “arbitral proceedings be conducted on an individual basis,” but only “[s]o long as [they left] open an judicial forum for class and collective claims.” (“emphasis in original”).

When evaluating whether a rule, including a mandatory arbitration provision, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D. R. Horton*; *Murphy Oil*; *Cellular Sales*. Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to [Section 7] activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Lutheran Heritage*, 343 NLRB at 647. The Board in *D. R. Horton* and *Murphy Oil* found that mandatory arbitration policies expressly violated employees’ rights to engage in protected concerted activity under the *Lutheran Heritage* analysis. See also *Brinker International Payroll Co. L.P.*, 363 NLRB No. 54 (2015). The Board held that if an arbitration policy is required as a condition of employment, then that rule violates Section 8(a)(1) of the Act if employees would reasonably believe the policy or rule interferes with their ability to file a Board charge or access to the Board’s processes, even if policy or rule does not expressly prohibit access to the Board. *Cellular Sales*, supra, slip op. at fn. 4.

Here, it is undisputed that the Agreement had been maintained as a condition of employment since February 2015, and explicitly prohibits employees from pursuing employment-related claims on a class or collective basis. The Agreement states that employees will bring their claims in an “individual capacity,” and not in a “class, collective, consolidated or representative proceeding.”

Thus, I find that the arbitration provision was a mandatory rule imposed by Respondent as a condition of employment and precludes the right to pursue concerted legal action violating Section 8(a)(1) of the Act. See *D. R. Horton*, supra, slip op. at 5; *Murphy Oil*, supra, slip op. at 24. The Agreement requires employees to agree to pursue any dispute they have against Respondent solely through individual arbitration thereby violating Section 8(a)(1) of the Act.

## Respondent’s Arguments

Many of Respondent’s arguments concerning the validity of the Board’s decision in *D. R. Horton* and *Murphy Oil* have been addressed previously by the Board. Respondent argues I should not follow *Murphy Oil* and *D. R. Horton*, and its progeny (R. Br. at 3). Respondent, however, failed to provide valid arguments distinguishing its arbitration policy with the ones found in *D. R. Horton* and *Murphy Oil*. Because *Murphy Oil* and *D. R. Horton* are Board precedents that have not been overturned by the Supreme Court or altered by a Board majority, I

must follow them.<sup>5</sup> *Manor West, Inc.*, 311 NLRB 655, 667 fn. 43 (1993); see also *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) (“We emphasize that it is a judge’s duty to apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether precedent should be varied.”). Overall, Respondent has not raised novel arguments, and moreover, any appeal to change Board law must be made directly to the Board.

First, Respondent argues that Sauk did not engage in concerted activity (R. Br. at 5–6). Respondent specifically argues that “it cannot be presumed” that Sauk engaged in protected concerted activity when he refused to sign the Agreement, and that he filed the Board charge only on behalf of himself. I reject Respondent’s argument. At issue in this complaint is the maintenance of a rule prohibiting the filing of class claims, not whether Sauk has engaged in activity prohibited by the rule. See *The Rose Group*, 363 NLRB No. 75, slip op. at 3 (2015).

Respondent’s Agreement essentially invokes a term and condition of continued employment for all employees at Respondent, including Sauk. The Agreement precludes the employees, including Sauk, from acting in concert to file collective or class litigation regarding wages, hours, or other working conditions. The Agreement forces employees to pursue their claims against Respondent individually which fundamentally interferes with employees’ core Section 7 rights of acting in concert to support one another. Sauk engaged in concerted activity when he refused to sign the Agreement, thereby preserving his Section 7 rights. In other words, Sauk engaged in concerted activity when he refused to prospectively waive his Section 7 right to engage in concerted activity. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 1, 5–8 (2015).

In addition, Sauk’s action of protesting the Agreement and filing the Board charge falls within the ambit of seeking to further the rights of all his coworkers even if he did not discuss his actions with them.<sup>6</sup> Furthermore, a rule such as the Agreement may be found unlawful even when a covered employee does not engage in protected concerted activity prohibited by the rule. *Murphy Oil*, supra, slip op. at 13 (citing *World Color (USA) Corp.*, 360 NLRB No. 37, slip op. at 2 (2014)) (“[A]n employer may violate Section 8(a)(1) even where an employee has not engaged in protected concerted activity—if, for example, the employer maintains a rule that reasonably would be interpreted by the employees as prohibiting Section 7 activity.”); *D. R. Horton*, supra, slip op. at 2–3. Thus, Sauk engaged in protected concerted activity when he refused to sign the Agreement. Furthermore, Sauk filed the instant unfair labor practice charge on behalf of all Respondent’s employees.

<sup>5</sup> As Respondent points out, the Fifth Circuit disagreed with the Board in *D. R. Horton*, and denied enforcement of the Board’s holdings. The Board explicitly addressed this issue in *Murphy Oil*, supra, slip op. 6–11.

<sup>6</sup> The charge states: Beginning in or about February 2015, the Employer has required all employees, as a condition of employment, to agree to an updated mandatory arbitration agreement seeking to prohibit class and representational actions in court and requiring employees to waive their right to participate in class and/or representational actions as a condition of continued employment.

Next, Respondent argues that Sauk “has no standing” because he resigned prior to the complaint being issued (R. Br. at 6–7). On the contrary, Sauk retained “standing” even though he resigned before this complaint was issued.<sup>7</sup> The Board has long held that the broad definition of “employee” contained in Section 2(3) of the Act covers former employees. See *Briggs Mfg. Co.*, 75 NLRB 569, 571 (1947); accord *Cellular Sales of Missouri*, supra, slip op. at 1 fns. 3, 7; see also *Frye Electric Inc.*, 352 NLRB 245, 357 (2008); *Redwood Empire, Inc.*, 296 NLRB 369, 391 (1989). Moreover, Section 102.9 of the Board’s Rules & Regulations provides that a charge may be filed by “any person” without regard to whether that person is a Section 2(3) employee. See also *Leslie’s Poolmart, Inc.*, 362 NLRB No. 184, slip op. at fn. 2 (2015) (charge filed by former employee).

Respondent cites to *Model A & Model T Car Corp.*, 259 NLRB 555 (1981), cited in *Halstead Metal Products v. NLRB*, 940 F.2d 66, 70 (4th Cir. 1991), for the proposition that an employee who voluntarily resigned was not protected by the Act.<sup>8</sup> The situation here is not analogous. In *Model A & Model T Car Corp.*, the General Counsel alleged a violation of the Act when an employer sent a letter to a former employee threatening to sue her for libel when after she resigned, she testified before a state agency regarding her working conditions while employed. The Board determined that the employer’s action of a libel lawsuit against the former employee was not covered by the Act since the employee was no longer employed by the employer. In contrast, while employed by Respondent, Sauk filed his charge regarding the Agreement with the Board. Even though Sauk resigned on May 8, 2015, Sauk still retained standing since the Act covers former employees. Thus, Sauk clearly retains standing in this matter.

Respondent then alleges that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 et. seq., preempts the Board from prohibiting class or collective actions waivers in arbitration agreements (R. Br. at 7–11). However, the Board clearly set forth its reasons why the Act does not conflict with or undermine the FAA. See *Murphy Oil*, supra, slip op. at 6; see also *D. R. Horton*, supra, slip op. at 10–16. First, the Board found that mandatory arbitration agreements are unlawful under the FAA’s savings clause because they extinguish substantive rights guar-

anteed by Section 7. Second, Section 7 amounts to a “contrary congressional command” overriding the FAA. Finally, the Board found that the Norris-LaGuardia Act indicates that the FAA should yield to accommodate Section 7 rights. The Norris-LaGuardia Act prevents enforcement of private agreements that prohibit individuals from participating in lawsuits arising out of labor disputes. In *Murphy Oil*, the Board stated, “Arbitration [under the FAA] is a matter of consent, and not coercion,” and a valid arbitration agreement may not require a party to prospectively waive its “right to pursue statutory remedies.” *Murphy Oil*, supra, slip op. 1–2. Applying the Board’s holding recited above, in this instance the FAA does not preclude a finding that Respondent’s waiver is invalid.

Furthermore, Respondent argues that *AT & T Mobility v. Concepcion*, 131 S.Ct. 1740, 1746 (2011), a Supreme Court decision issued after *D. R. Horton*, and other related case law, support the argument that *D. R. Horton* must be rejected (R. Br. at 3, 9–11, 14–15). Respondent argues that I am bound by these Supreme Court cases (R. Br. at 3–4). Again, the Board in *Murphy Oil* addressed those arguments, distinguishing that Section 7 of the Act substantively guarantees employees the right to engage in collective action, including collective legal action, for mutual aid and protection concerning wages, hours, and working conditions. See *Murphy Oil*, supra, slip op. at 7–9; *Chesapeake Energy Corp.*, supra, slip op. at 3. Further, as to contrary circuit court decisions, the Board is not required to acquiesce in adverse decisions of the Federal courts in subsequent proceedings not involving the same parties. *Murphy Oil*, supra, slip op. 2 fn. 17, citing *Enloe Medical Center v. NLRB*, 433 F.3d 834, 838 (D.C. Cir. 2005).

Thereafter, Respondent alleges that Section 7 of the Act does not include the right to pursue class action complaint, and does not constitute protected concerted activity (R. Br. at 11–13). However, as the majority reaffirmed in *Murphy Oil*, “the NLRA does not create a right to class certification or the equivalent, but as the *D. R. Horton* Board explained, it does create a right to pursue joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint.” *Murphy Oil*, supra, slip op. at 2 (citing *D. R. Horton*, supra, slip op. at 10 fn. 24). Here, Respondent’s Agreement, as a condition of employment, precludes employees from pursuing claims concertedly and thus “amounts to a prospective waiver of a right guaranteed by the NLRA.” *Murphy Oil*, supra, slip op. at 9 (citing *National Licorice Co. v. NLRB*, 309 U.S. 350, 361 (1940), and *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944)). This preclusion infringes on employees’ Section 7 rights, and thus violates Section 8(a) (1) of the Act.

Respondent finally argues that “even if Section 7 confers a right to class action procedures, Section 7 rights can be waived” (R. Br. at 13–14). Again, the Board found in *D. R. Horton* that “employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums arbitral and judicial” as a condition of employment. Supra, slip op. at 12 (emphasis in original). In *Murphy Oil*, the Board stated, “That an employer may collectively bargain a particular grievance-and-arbitration procedure with a union is not to say that it may unilaterally impose any dispute-resolution procedure it wishes on unrepresented employees, including a

<sup>7</sup> Respondent also argues that Sauk has no “standing” under Art. III of the United States Constitution because he did not sign the Agreement, and suffered no injury since he was not disciplined or terminated for failing to sign the Agreement (R. Br. at 6 fn. 4). Sauk, on the contrary, has suffered an “injury.” Respondent forced Sauk to make a choice between waiving his Section 7 rights or face adverse consequences. Simply because Respondent did not follow through on its consequences does not mean that Sauk suffered no harm. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. 5 (2015) (opt-out provision of arbitration agreement forced employees to reveal their sentiments concerning Sec. 7 activity).

<sup>8</sup> Respondent also cites to other court cases including a Supreme Court case for the proposition that since Sauk resigned he no longer has the right to improve the working conditions of his former employer (R. Br. at 6–7). As explained, any person can file a charge alleging unfair labor practices as an employer. The relief the General Counsel and Sauk seek is on behalf of all Respondent’s employees since the invocation of the Agreement.

## CALIFORNIA COMMERCE CLUB, INC.

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procedure that vitiates Section 7 rights, simple because it takes the form of an agreement.” Supra, slip op. at 15. In addition, “Federal labor law and policy . . . prohibit agreements in which employees prospectively waive their right to engage in concerted activity for mutual aid or protection.” *On Assignment Staffing Services*, supra, slip op. at 8 (2015). The Board has consistently struck down agreements that require employees to prospectively waive their Section 7 rights. See *Mandel Security Bureau*, 202 NLRB 117, 119 (1973) (Board found unlawful an agreement requiring discharged employee to waive right to “future charges and concerted activities” in exchange for reinstatement); *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 175–176 (2001) (Board found settlement agreement overly broad when employer offered monetary settlement in exchange “for refraining from protected concerted activities for a 1-year period”). Thus, Respondent may not require its employees to waive their Section 7 rights.

Accordingly, I find that Respondent’s maintenance of the Agreement, as a mandatory condition of employment, prohibited employees from bringing forth claims against Respondent in a concerted manner which thereby violates Section 8(a)(1) of the Act as set forth in *D. R. Horton and Murphy Oil*.

*B. Respondent’s Confidentiality Provision*

The complaint alleges, at paragraph 4(c), that Respondent violated Section 8(a)(1) of the Act by requiring that any arbitration proceedings be confidential and prohibiting any discussion of “any evidence or award/decision beyond the arbitration proceeding” thereby interfering with employees’ ability to discuss topics covered by Section 7 of the Act which precludes employees from engaging in conduct protected by Section 7.<sup>9</sup>

The right of employees to discuss workplace matters, including any evidence or arbitration award or decision, is a fundamental Section 7 right. Although the confidentiality provision of the Agreement only prohibits discussion of evidence obtained during the course of the arbitration proceeding, it still explicitly limits employees’ right to discuss terms and conditions of employment such as wages. It is well settled that any work rule which prohibits employees from discussing their working conditions such as wages is unlawful. *Professional Janitorial Services of Houston, Inc.*, 363 NLRB No. 35 (2015) (finding confidentiality provision of employer’s arbitration policy was unlawfully overbroad: “all statements and information made or revealed during arbitration except on a ‘need to know’ basis or as permitted or required by law), citing *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 1–3 (2015) (finding unlawful rule that prohibited disclosure of “any information about the Company which has not been shared by the Company with the general public); *Fresh & Easy Neighborhood Market*, 361 NLRB No. 8, slip op. at 2–3 (2014); *Lily Transportation Corp.*, 362 NLRB No. 54, slip op. at fn. 2 (2015). In as much as workplace rules precluding employees to discuss grievances and disciplinary actions violate the Act, the rule set forth by Respondent does the same. *Dou-*

*ble Eagle Hotel & Casino*, 341 NLRB 112, 116–117 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006) (finding unlawful handbook rule that prohibited disclosure of “confidential information,” including “grievance/complaint information”). Thus, the confidentiality provision in the Agreement violates Section 8(a)(1) of the Act.

*Respondent’s Arguments*

Respondent argues that the Federal Arbitration Act requires enforcement of the arbitration terms, including any confidentiality provisions. Respondent states, “Confidentiality ensures that parties save resources and reputation costs by arbitration disputes outside the public purview” (R. Br. at 4, 18–21, emphasis in original). Respondent also argues that the confidentiality provision of the Agreement does not “prevent an employee from discussing anything else related to their employment, including the very events or circumstances that give rise to arbitration proceedings” (R. Br. at 17, emphasis in original). In other words, employees may still discuss terms and conditions of employment. I disagree with all Respondent’s arguments. Respondent’s confidentiality language is broadly written with language that encompasses all aspects of the dispute. These “very events or circumstances that give rise to arbitration proceedings” could be “any evidence” as precluded by the confidentiality provision. Nothing in the provision suggests that the prohibition is as limiting as Respondent suggests. “[E]mployees should not have to decide at their own peril what information is not lawfully subject to such a prohibition.” *Hyundai American Shipping Agency, Inc.*, 357 NLRB 860, 871 (2011).

Respondent claims that its confidentiality provision ensures that employees do not discuss “confidential business records or information protected by the right of privacy produced in the course of discovery” (R. Br. at 17). Respondent cites to two Board decisions which found lawful employers’ handbook rules: In *Lafayette Park Hotel*, 326 NLRB 824, 826 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), the Board found lawful an employer rule setting forth unacceptable conduct as divulging private employer information to employees and other individuals or entities not authorized to receive such information. The employer argued that it had the right to keep its business records confidential. With regard to the factual circumstances in *Lafayette Park Hotel*, the Board reasoned that a reasonable employee would know that the rule would not prohibit discussion of wages and working conditions among employees or a union. In *K-Mart*, 330 NLRB 263, 263 (1999), the Board, citing *Lafayette Park Hotel*, found the employer’s confidentiality provision in its handbook lawful. The provision stated that company business and documents are confidential, and disclosure of such information is prohibited.

The above cases may be distinguished from the facts presented here. The above rules occurred in employee handbooks while the instant confidentiality provision occurred in the Agreement which requires mandatory arbitration while prohibiting class or collective action. Furthermore, the confidentiality provision in the Agreement does not specify what may not be shared with others such as confidential business records and what may be shared with others such as the “very events” lead-

<sup>9</sup> The confidentiality provision of the Agreement states, “The arbitration shall be conducted on a confidential basis and there shall be no disclosure of evidence or award/decision beyond the arbitration proceeding.”

ing to the arbitration proceeding as Respondent suggests. As discussed above, the Board recently determined that a similar confidentiality provision in an arbitration agreement violated the Act as unlawfully overbroad. See *Professional Janitorial Services of Houston*, supra, slip op. at 1. Contrary to Respondent's assertions, the confidentiality provision is unlawfully overbroad as it prohibits the discussion of terms and conditions of employment. See also *Rio All-Suites Hotel & Casino*, supra, slip op. at 1-3 (2015) (finding unlawful rule that prohibited disclosure of any information about the Company which has not been shared by the Company with the general public).

Accordingly, I find that Respondent's confidentially provision within the Agreement violates the Act. In doing so, I find that Respondent restricted the exercise of employees' Section 7 rights in violation of Section 8(a)(1) of the Act.

#### CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. By requiring employees to sign and maintain since February 2015, an Arbitration Agreement and Mandatory Dispute Resolution Process under which employees are compelled, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, and has violated Section 8(a)(1) of the Act.

3. By requiring that any arbitration proceedings be confidential and prohibiting any discussion of any evidence or award/decision beyond the arbitration proceeding, Respondent violated Section 8(a)(1) of the Act.

#### REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the Agreement is unlawful, the recommended Order requires that Respondent revise or rescind it in all its forms to make clear to employees that the Agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums. Respondent shall notify all current and former employees since February 2015, who were required to sign the Agreement in any form that it has been rescinded or revised, and if revised, provide them a copy of the revised Agreement.

In addition, any revised Agreement shall inform employees that the arbitration proceedings are not confidential and employees are not prohibited from discussing any evidence or award/decision beyond the arbitration proceeding.

Respondent shall post a notice in all locations where the Agreement, or any portion of it requiring all and/or enumerated employment-related disputes to be submitted to individual arbitration, was in effect. See, e.g., *U-Haul of California*, supra, fn. 2; *D. R. Horton*, supra, slip op. at 17; *Murphy Oil*, supra, slip op. at 22. Respondent is also ordered to distribute appropriate remedial notices to its employees electronically, such as by email, posting on an intranet or internet site, and/or other ap-

propriate electronic means, if it customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law and the entire record, I issue the following recommended<sup>10</sup>

#### ORDER

Respondent, California Commerce Club, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration policy that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) Maintaining a rule that prohibits the discussion of terms and conditions of employment by prohibiting employees from discussing matters regarding an arbitral proceeding.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the Agreement in all its forms, or revise it in all its forms to make clear that the Agreement does not constitute a waiver of employees' right to initiate or maintain employment-related joint, class, or collective actions in all forums, and that it does not prohibit employees' discussion of terms and conditions of employment by prohibiting employees from discussing matters regarding an arbitral proceeding.

(b) Notify all current and former employees since February 2015 who were required to sign the Agreement of the rescinded, or revised, arbitration provision, to include providing them with a copy of any revised provisions, acknowledgment forms, or other related documents, or specific notification that the arbitration provision has been rescinded.

(c) Within 14 days after service by the Region, post at its facility in Commerce, California, copies of the attached notice marked "Appendix."<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered,

<sup>10</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>11</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## CALIFORNIA COMMERCE CLUB, INC.

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defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since February 1, 2015.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. January 6, 2016

## APPENDIX

## NOTICE TO EMPLOYEES

## POSTED BY ORDER OF THE

## NATIONAL LABOR RELATIONS BOARD

## An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT maintain a rule that prohibits employees from discussion of terms and conditions of employment by prohibiting employees from discussing any evidence or award/decision beyond the arbitration proceeding.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the requirement that employees enter into or sign the arbitration provision that is currently in effect, as a condition of employment, and expunge all such provisions at all of Respondent's facilities where Respondent has required employees to sign such provisions.

WE WILL rescind the Arbitration Agreement and Mandatory Dispute Resolution Process (the Agreement) in all its forms, or revise it in all its forms to make clear that the Agreement does not constitute a waiver of your right to initiate or maintain employment-related joint, class, or collective actions in all forums, and that it does not prohibit your discussion of terms and conditions of employment by prohibiting you from discussing matters regarding an arbitral proceeding.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the Agreement in all its forms that the Agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised policy.

CALIFORNIA COMMERCE CLUB, INC.

The Administrative Law Judge's decision can be found at [www.nlrb.gov/case/21-CA-149699](http://www.nlrb.gov/case/21-CA-149699) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



JUN 23 2016

RECEIVED

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED

JUN 23 2016

CLERK

No. 16-1203

CALIFORNIA COMMERCE CLUB, INC.,

*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

ORIGINAL

**PETITIONER'S CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioner California Commerce Club, Inc. d/b/a Commerce Hotel and Casino ("Petitioner"), hereby makes the following Corporation Disclosure Statement:

- 1) Petitioner does not have a parent company;
- 2) There is no publicly traded company that owns 10% or more of the stock of Petitioner; and
- 3) Petitioner is a hotel and casino located in Los Angeles County.

Dated: June 23, 2016

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By



David Gallacher, Bar No. 49040

Sheppard, Mullin, Richter &  
Hampton, LLP

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dgallacher@sheppardmullin.com

Counsel for Petitioner California Commerce  
Club, Inc. d/b/a Commerce Hotel and Casino

**CERTIFICATE OF SERVICE**

I hereby certify that on June 23, 2016, I caused a true and accurate copy of the foregoing **PETITIONER'S CORPORATE DISCLOSURE STATEMENT** to be served via first class U.S. mail, postage prepaid on the following person(s):

National Labor Relations Board  
Region 21  
888 South Figueroa St., 9<sup>th</sup> Floor  
Los Angeles, CA 90017-5449  
Tel No.: (213) 894-5204  
Fax No.: (213) 894-2778  
Email: NLRBRegion21@nlrb.gov; Lindsay.Parker@nlrb.gov

William J. Sauk  
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Email: kipsauk62@gmail.com

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